No. 98-966

In The

Supreme Court of the United States

October Term, 1998

CITY OF DALLAS, TEXAS, DODD MILLER,

Petitioners,

vs.

DALLAS FIRE FIGHTERS ASSOCIATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

ANGELA K. WASHINGTON
INTERIM CITY ATTORNEY
Texas State Bar No. 20897155

JANICE S. MOSS
ASSISTANT CITY ATTORNEY
Texas State Bar No. 14586050
Counsel of Record

LIZBETH ISLAS
ASSISTANT CITY ATTORNEY
Texas State Bar No. 00787750
7CN Dallas City Hall
1500 Marilla Street
Dallas, Texas 75201
(214) 670-3510 – Telephone
(214) 670-3515 – Telecopier

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioners City of Dallas, Texas, and Dodd Miller ("Petitioners," "the City," or "Miller") file this Reply to Respondents' Brief in Opposition to Petition for Writ of Certiorari. In support thereof, Petitioners respectfully show the Court as follows:

STATEMENT OF THE CASE

Respondents allege that Petitioners mischaracterize the opinion of the United States Court of Appeals for the Fifth Circuit ("the Fifth Circuit"). Specifically, Respondents erroneously assert that Petitioners claimed that the Fifth Circuit held that the following five factors weighed in favor of out of rank order promotions: (1) only qualified individuals are promoted; (2) the fire department uses banding of test scores to ensure that the beneficiaries of out of rank order promotions are equally qualified to those whom they pass over; (3) the affirmative action plan under which the promotions are made lasts only five years; (4) the affirmative action promotions to a rank will cease when the manifest imbalance in the rank is eliminated; and (5) only 50% of annual promotions to a rank may be made under the affirmative action plan. Respondents' Brief, p. 1. Petitioners, however, merely stated that the Fifth Circuit recognized these factors as weighing in favor of out of rank order promotions. Petition for Writ, p. 4. Regardless, the Fifth Circuit's opinion speaks for

itself. *Dallas Fire Fighters Ass'n, et al. v. City of Dallas, et al.*, 150 F.3d 438, 441, n.13 (5th Cir. 1998); *see* App. A.

Respondents further make contradictory arguments regarding the City's use of banding. Respondents initially claim that the Fifth Circuit did not address banding (Respondents' Brief, p. 1), and then Respondents argue that the Fifth Circuit correctly determined that banding was insufficient (Respondents' Brief, p. 7). While the Fifth Circuit did not discuss in detail the City's use of banding, the Fifth Circuit clearly recognized the concept of banding and did not strike it down. *Dallas Fire Fighters Ass'n*, 150 F.3d at 441, n.13; *see* App. A. In addition, this Court denied certiorari in a case in which the United States Court of Appeals for the Ninth Circuit ("the Ninth Circuit") found the concept of banding constitutional. *Officers for Justice v. Civil Serv. Comm'n*, 979 F.2d 721 (9th Cir.), *cert. denied*, 507 U.S. 1004 (1993). In this case, banding is merely one factor that weighs in favor of the constitutionality of out of rank order promotions. *See Dallas Fire Fighters Ass'n*, 150 F.3d at 441, n.13; *see also* App. A.

Finally, contrary to Respondents' assertions, Petitioners adequately addressed the central issue in this case, that is, that black, hispanic and female firefighters were promoted ahead of male, nonminority firefighters who had scored higher on the promotion examination. Petition for Writ, pp. 3-7. In fact, the constitutionality of this practice is the important federal question which needs to be reviewed and resolved by this Court. *See* Petition for Writ, p. i.

REASONS FOR GRANTING THE WRIT

I. THE CITY HAS DEMONSTRATED A COMPELLING GOVERNMENTAL INTEREST OF PAST DISCRIMINATION AND ITS LINGERING PRESENT EFFECTS.

Respondents' argument that the 1976 consent decree between the United States Department of Justice and the City predicated on historical discrimination against minorities and females ("1976 consent decree") is not applicable in this case because it addressed the fire department's hiring practices, not its promotional practices, is nonsensical. Respondents' Brief, p. 3. The fire department's past discrimination against minorities and females in hiring has a direct relationship to the promotion of minorities and females, because but for the department's past discriminatory hiring practices, more minorities and females would be members of the department and could avail themselves of promotional opportunities. This is especially significant in that the department makes no lateral hires and promotes only within its ranks.

Respondents further argue that the consent decree is not applicable in this case because it alludes to discrimination that might have occurred within the department. Respondents' Brief, p. 3. Respondents point to one phrase in the consent decree while ignoring the document as a whole. Specifically, the Department of Justice concluded that the City had engaged in discriminatory practices resulting in the City's entering into a consent decree. *See* App. L, M. But for the City's entering into the consent decree, the Department of Justice would have continued pursuing its litigation against the City for discrimination against minorities and females in employment in the

DFD. Past discrimination sufficient to trigger a compelling governmental interest can be based on "judicial, legislative, or administrative findings of constitutional or statutory violations." *Richmond v. J.A. Croson Co.*, 488 U.S. at 469, 497 (1989), *quoting Regents of Univ. of California v. Bakke*, 438 U.S. 265, 308-309 (1978) (opinion of Powell, J.).

Respondents further attempt to bolster their case by pointing out that the City never admitted that it engaged in racial or gender discrimination in *Black Fire Fighters Ass'n v. City of Dallas*, 805 F.Supp. 426 (N.D. Tex. 1992), *aff'd*, 19 F.3d 992 (5th Cir. 1994). Such an admission, however, is not required before a public employer adopts an affirmative action plan. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-278, 289 (1986). In her concurrence in *Wygant*, Justice O'Connor agrees with the plurality decision that "a contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action plan." *Wygant*, 476 U.S. at 289 (O'Connor, J., concurring). Justice O'Connor's policy concern was that if public employers were compelled to demonstrate their own history of illegal discrimination in order to justify adoption of voluntary affirmative action programs, they would necessarily be discouraged from voluntarily complying with their civil rights obligations. *Wygant*, 476 U.S. at 290-291 (O'Connor, J., concurring).

Contrary to Respondents' assertions, the City's articulation of statistical evidence is not in lieu of compliance with the equal protection clause, but rather in keeping with equal protection standards. The City's argument is not to be free from equal protection limitations but that it

has shown that its promotional decisions fall well within the two-step analytical framework set forth by this court.

First, the City has shown a compelling governmental interest through the gross statistical disparities still existing twenty plus years after the City entered into a consent decree in a lawsuit in which the Department of Justice sued the City for discriminatory practices. The Department of Justice dismissed the lawsuit without prejudice only in consideration of the City's entering into the consent decree and agreeing to fulfill its obligations therein. The City does not contend that the gross statistical evidence alone is sufficient to justify out of rank order promotions but rather that the gross statistical disparity coupled with the consent decree and the Department of Justice finding of discriminatory practices is sufficient to establish present effects of past discrimination. *See Croson*, 488 U.S. at 509; *United States v. Paradise*, 480 U.S. 149, 170, n.20 (1987); and, *Wygant*, 476 U.S. at 275.

Second, the City has met the constitutional test under equal protection by narrowly tailoring the race-based promotional decisions. *See infra* §II; *see also* Petition for Writ, pp. 15-24. Finally, neither *Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977, 992 (1988) nor *Maryland Troopers Ass'n v. Evans*, 993 F.2d 1072 (4th Cir. 1993) prohibits the use of statistical evidence if the City meets the aforementioned test.

Respondents attempt to distinguish *McNamara v. City of Chicago*, 138 F.3d 1219 (7th Cir.), *cert. denied*, ___ U.S. ___, 1998 WL 423784 (1998) which conflicts with the Fifth Circuit's opinion in this case by stating that the decision in *McNamara* was based on evidence of direct discrimination. Respondents' Brief, p. 4. The *McNamara* court based

its finding on more than the direct evidence of discrimination by senior officials. In upholding the use of out of rank order promotions, the court also relied on a 1974 settlement of a discrimination lawsuit and the statistical disparities continuing to exist in the 1990s. *Id.*

II. THE USE OF RACE-BASED, OUT OF RANK ORDER PROMOTIONS IS NARROWLY TAILORED.

Respondents offer nothing to support their contention that the City's evidence of present effects of past discrimination is insufficient. To the contrary, the City's evidence of (1) the 1976 consent decree, (2) a Department of Justice finding of discriminatory practices, and (3) the gross statistical disparities between minorities and females and nonminority males which continue to exist thirty years after minorities and females were first hired in the department is sufficient to find a compelling governmental interest. Respondents point to remedies other than out of rank order promotions to "deal with any effects of any possible past racial/gender discrimination by the fire department." Respondents' Brief, p. 5. Yet, these remedies have not been effective in remedying the present effects of past discrimination, as is evidenced by the gross statistical disparities between minorities and women and nonminorities which continue to exist in the department, more than two decades after the City entered into a consent decree with the Department of Justice. *See* App. N. The out of rank order promotions were used only as a last resort because other means of eradicating the discrimination within the fire department were dismally unsuccessful. *See Wygant*, 476 U.S. at 280, n.6. More importantly, not only have the alternative remedies been

ineffective, but even the out of rank order promotions have not cured the present effects of past discrimination as shown by the gross statistical disparities between white males and minorities and females in the DFD. *See* App. N.

Contrary to Respondents' assertions, this Court has held that a "denial of a promotion unsettled no legitimate firmly rooted expectation on the part of the petitioner." *Johnson v. Transportation Agency*, 480 U.S. 616, 638 (1987); *see Paradise*, 480 U.S. at 183 and *Wygant*, 476 U.S. at 282-283. Therefore, the Fifth Circuit's ruling that out of rank order promotions are unconstitutional because those promotions interfere with the "legitimate expectations of those warranting promotion based upon their performance in the examinations" contradicts United States Supreme Court case law. *See id.; see also Dallas Fire Fighters Ass'n*, 150 F.3d at 441 (App. A).

Respondents assert that the City's use of out of rank order promotions are not narrowly tailored because they do not satisfy the four factors set forth by this Court when determining whether race-based remedial actions are narrowly tailored. Respondents' Brief, p. 6. Respondents fail, however, to support their assertions in law with citations to proper legal authority, or in fact with references to the record. Therefore, they are without merit.

Finally, Respondents misrepresent the holding of the Ninth Circuit in *Officers for Justice*. Respondents' Brief, p. 7. In *Officers for Justice*, the court held that "the banding process is valid as a matter of constitutional and federal law." *Officers for Justice*, 979 F.2d at 728. As such, the

Ninth Circuit's holding contradicts with the Fifth Circuit's ruling in which it grants an expectation of promotion based strictly on test score. *See Dallas Fire Fighters Ass'n*, 150 F.3d at 441 (App. A).

III. THE USE OF OUT OF RANK ORDER PROMOTIONS DOES NOT VIOLATE TITLE VII.

Respondents do not dispute the existence of manifest imbalance in the fire department; neither did the Fifth Circuit or the district court. *See* Respondents' Brief, pp. 7-10; *Dallas Fire Fighters Ass'n*, 150 F.3d at 441; *Dallas Fire Fighters Ass'n, et al. v. City of Dallas, et al.*, 885 F.Supp. 915, 921 (N.D. Tex. 1995).

As discussed in the Petition for Writ, the City's use of out of rank order promotions did not unnecessarily trammel the rights of nonminority males. Respondents retained their employment with the department, at the same salary and with the same seniority, and remained eligible for other promotions and exams (*compare Wygant*, 476 U.S. at 282 (Plaintiffs were laid off from their teaching positions in favor of less senior minority teachers.)). Nonminority males continued to be promoted in excess of their representation among test takers and in rates higher than any other singular ethnic or gender class. Moreover, the City's affirmative action plan contains several safeguards to protect the rights of nonminority males including, but not limited to, the following: minorities and females compete with all qualified candidates for promotions; no persons are automatically excluded from consideration; all qualified candidates (and *only* qualified candidates) including minorities, females and nonminority males are considered for promotion; all candidates must pass the same promotional examination to be considered for a promotion; and, no unqualified candidates are promoted.

It is undisputed that all persons are promoted from the relevant labor pool. Because the fire department does not allow lateral hires, the attainment of the affirmative action plan goals is limited to candidates in the appropriate labor pool which is determined by internal availability, that is, the number of minority or female officers within the next lower rank. *See* App. N, p. 91. Therefore, the relationship between the attainment of the stated affirmative action goals and the appropriate labor pool is sufficient to justify use of out of rank order promotions, and Respondents' argument regarding the goals is meaningless and without merit.

Respondents erroneously state that it is undisputed that the only factors the City considered when promoting candidates were race and/or gender. Respondents' Brief, p. 9. Race and gender were **not** the only factors that the City considered when promoting in out of rank order. The following additional factors were considered: all applicants must pass the promotional examination to be considered for a promotion; no unqualified persons were promoted; minority and female applicants competed with all qualified applicants for promotion; no persons were automatically excluded from consideration; all qualified applicants (and only qualified applicants) including minorities, females and male nonminorities, were considered for promotions.

CONCLUSION

If the Fifth Circuit's ruling is not reviewed by this Court, it will severely impact and unnecessarily burden

all local governments within the Fifth Circuit because the Fifth Circuit has created a right of recovery not previously recognized by this Court, and the holding of the Fifth Circuit further contradicts United States Supreme Court case law and conflicts with decisions of other United States Courts of Appeals. For the reasons stated herein, Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari, to review and reverse the opinion of the Fifth Circuit and render judgment in favor of Petitioners in all respects and on all issues, and, alternatively, to review and remand this case for a new trial for the reasons stated herein, and for such other and further relief, at law and in equity, to which Petitioners show themselves justly entitled.

Respectfully submitted,

City Attorney of the
City of Dallas

ANGELA K. WASHINGTON
Interim City Attorney
Texas State Bar No. 20897155

JANICE S. MOSS
Assistant City Attorney
Texas State Bar No. 14586050
Counsel of Record

LIZBETH ISLAS
Assistant City Attorney
Texas State Bar No. 00787750
7CN Dallas City Hall
1500 Marilla Street
Dallas, Texas 75201
(214) 670-3510 – Telephone
(214) 670-3515 – Telecopier

Attorneys for Petitioners